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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1037

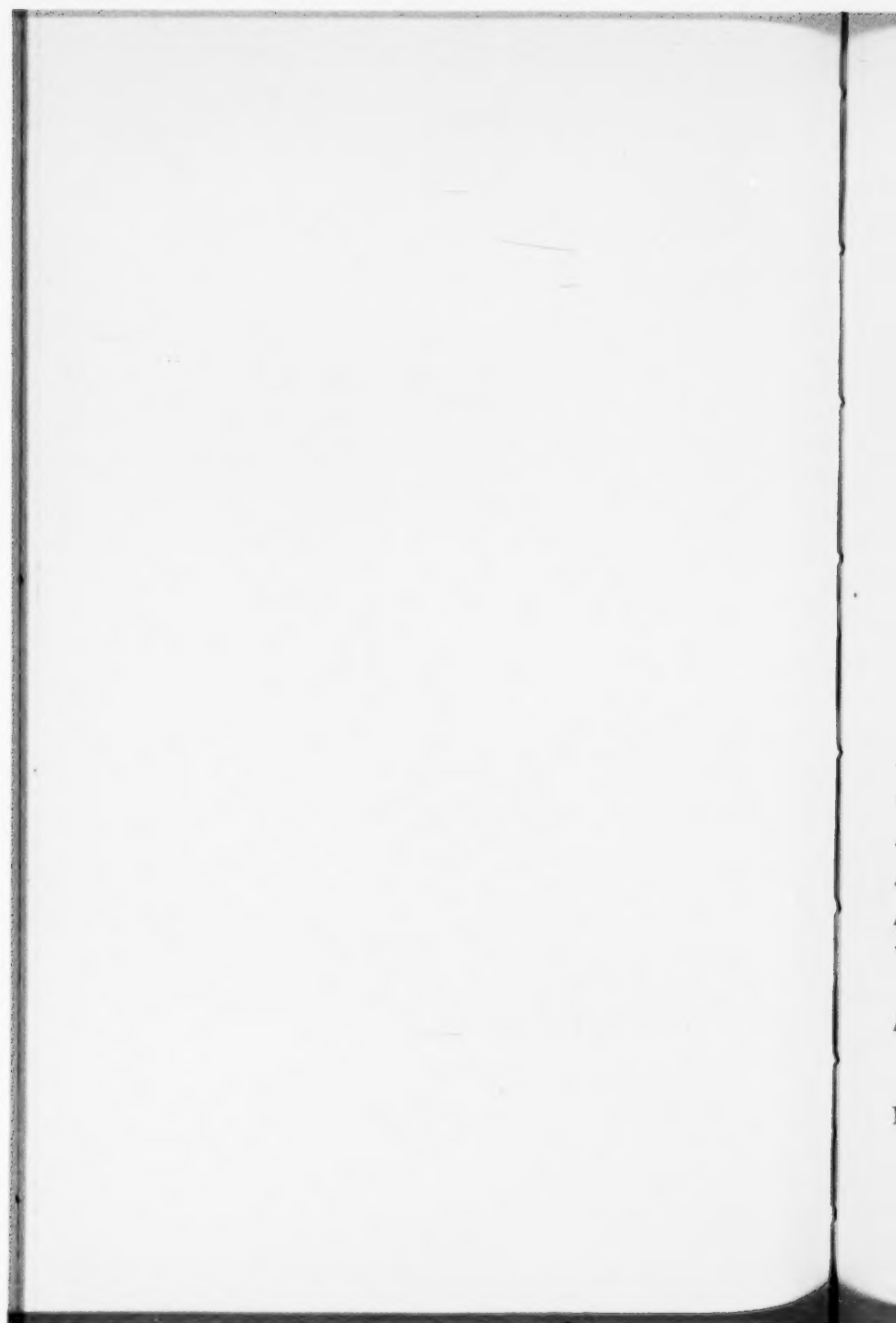
THE BRIDGEPORT CITY TRUST COMPANY and ARTHUR E.
ALLING, Executors of the Estate of NOYES E. ALLING,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit**

Charles B. McInnis
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INDEX.

SUBJECT	PAGE
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2, 3
Specification of errors to be urged	3, 4
Reasons for granting the writ	4, 5, 6, 7, 8, 9
Conclusion	10

CITATIONS

<i>United States v. Field</i> , 255 U. S. 257	5
<i>Helvering v. Helmholz</i> , 75 Fed. (2d) 245	4, 5, 6, 7, 8, 9
<i>Charles H. W. Foster, et al, Executors</i> , 26 B. T. A. 708, aff'd. C. C. A., 1st Cir., March 20, 1933	5, 7, 9
<i>May v. Heiner</i> , 281 U. S. 238	5, 9
<i>Gould v. Gould</i> , 245 U. S. 151, 153	5
<i>Burnet v. Northern Trust Co.</i> , 283 U. S. 782	5, 9
<i>Morsman v. Burnet</i> , 283 U. S. 783	5, 9
<i>McCormick v. Burnet</i> , 283 U. S. 784	5, 9
<i>Waldemar R. Helmholz, Executor</i> , 28 B. T. A. 165; affd., 75 Fed. (2d) 245; affd., 296 U. S. 93	8
<i>McFadden v. United States</i> , 20 Fed. Supp. 625	8

STATUTES

Revenue Act of 1926, c. 27, 44 Stat. 9: Secs. 302 (c) and (d), as originally enacted	11, 12
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The petitioners through their attorney of record pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on December 15, 1941, reversing the decision of the United States Board of Tax Appeals.

Opinions Below

The opinion of the United States Board of Tax Appeals (R. 43-63) is reported in 41 B. T. A. 191.

The opinion of the Circuit Court of Appeals (R. pp. 38-43) is reported in 124 F. (2d) 48.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 15, 1941 (R. pp. 44-45). Jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

The question presented is whether there should be included in the gross estate of petitioners' decedent under either Sec. 302(c) or 302(d) of the Revenue Act of 1926, as originally enacted, any part of certain property which was transferred in 1929 by petitioners' decedent to an *inter vivos* trust.

Statutes Involved

The statutes involved are Secs. 302(c) and 302(d) of the Revenue Act of 1926, as originally enacted. In the Appendix annexed hereto will be found a complete text of the applicable statutes.

Statement

The facts, as stipulated and adopted by the Board as its findings of fact (R. 46-54) may be summarized as follows:

Petitioners' decedent transferred in trust certain securities on January 10, 1929. The Trust Agreement provided for the payment of the income therefrom to the decedent's daughters, or the survivor or survivors of any of them, as long as they, or any of them, should live. After the death of the last surviving daughter, the income was to be paid to the decedent's grandchildren (excluding grand-

children thereafter born, according to the interpretation of the trust instrument by the Connecticut Courts) as long as any of such grandchildren, or the survivor or survivors of any of them, should live. The remainder thereafter was to go to the decedent's lineal descendants, with provision for distribution to charitable organizations if lineal descendants failed.

In the Trust Agreement, the decedent reserved during his lifetime the power to reallocate the disposition of the income of the trust fund, such reallocation to be limited strictly to those named as beneficiaries in the trust instrument. No action was taken by the decedent under this reserved power during his lifetime and he died on June 19, 1934.

The respondent's contention that the corpus of this trust, or at least the value of the beneficiaries' life interests, should be included in decedent's gross estate was denied by the United States Board of Tax Appeals. The Circuit Court reversed the Board, holding that there should be included in decedent's gross estate the value, as of the date of death of decedent, of the life interests of those beneficiaries of the trust over which the decedent had during his lifetime a certain reserved power of reallocation, as described above.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding that any part of the property transferred in trust should be included in decedent's gross estate under Sec. 302(d) of the Revenue Act of 1926.
2. In holding that the power of reallocation reserved to the decedent in the trust instrument should be construed

as including a power to reallocate income payable to any income beneficiaries other than the income payable to decedent's three daughters.

3. In failing to hold that no part of the property transferred in trust should be included in decedent's gross estate under either Sec. 302(c) or 302(d) of the Revenue Act of 1926, or any other applicable provisions of law.

4. In reversing the decision of the Board of Tax Appeals.

Reasons for Granting the Writ

1. Petitioners contend that the Court below has rendered a decision in conflict with the decision of the Court of Appeals of the District of Columbia in the case of *Helvering v. Helmholz*, 75 Fed. (2d) 245, and in addition has decided a Federal estate tax question in a way probably in conflict with the decision of this Court in the same case, this Court having affirmed the Court of Appeals of the District of Columbia in the *Helmholz* case in 296 U. S. 93.

In the *Helmholz* case, the decedent during her lifetime had conveyed certain property to a trustee, income to be paid to the decedent during her lifetime and thereafter income to be paid to such living appointee or appointees during their lifetime as decedent should by her will designate. Upon the death of such appointee or appointees the corpus was to go irrevocably to certain specified remaindermen. Upon the decedent's death in 1927, she having by will designated her husband as the recipient of the income for the duration of his life, the Commissioner attempted to include the trust corpus in her estate for Federal estate taxation. The Commissioner contended *inter alia* that the

decedent's power to designate the income beneficiaries after her death made the property transferred a part of her gross estate under Sec. 302(d) of the Revenue Act of 1926. The Board of Tax Appeals denied his contention saying (pp. 171-172):

"In *Charles H. W. Foster, et al, Executors*, 26 B. T. A. 708, aff'd. C. C. A., 1st Cir., March 20, 1933, we said:

" * * * Where, as here, gifts are made irrevocably to a trust and the donor reserves the income to himself for life and the right to designate the beneficiaries of the income after his death, which right is exercised in accord with the trust agreement, it is doubtful whether any portion of the trust property should be included in the decedent's gross estate in view of the decision in *May v. Heiner, supra*. Such doubts should be resolved in favor of the taxpayer (*Gould v. Gould*, 245 U. S. 151, 153), particularly in view of the fact that immediately following the *per curiam* decision in *Burnet v. Northern Trust Co., supra*; *Morsman v. Burnet, supra*; *McCormick v. Burnet, supra*, Congress amended Section 302 (c) of the Revenue Act of 1926 by joint resolution (public 131), approved March 4, 1931, which specifically provides for the inclusion of property transferred in trust where the transferor "has retained for his life * * * the income from the property or * * * the right to designate the persons who shall * * * enjoy * * * the income therefrom". The amendment was not retroactive and has been applied only to transfers "made after 10:30 P. M. * * * March 3, 1931". Treasury Decision 4314. See *United States v. Field*, 255 U. S. 257."

"(P. 172) 'In the instant proceeding, Mrs. Helmholtz had irrevocably disposed of the corpus of the trust, and that property went to the remaindermen

designated in the trust agreement, upon the termination of the trust. She had no power to alter, amend, or revoke the trust instrument that would effect such a disposition as was possible in the *Porter* case and bring the property within the purview of subdivision (d).’ ”

The Court of Appeals of the District of Columbia affirmed saying (p. 247):

“* * * we think it perfectly obvious, as the Board found, that in the trust agreement Mrs. Helmholz divested herself completely of legal title to the shares contributed by her to the trust estate and merely reserved a life interest in the income and a limited power of appointment respecting it; and, if we are correct in this conclusion, it follows that the value of the shares of stock which she transferred to the trust some nine or ten years before her death could not legally be included in determining the amount of her estate.”

This Court, in turn, affirmed the decision and in affirming was cognizant of the decedent’s reservation of a power of appointment over the income of the trust fund, as is indicated by the following statement from this Court’s opinion at Page 94.

“Her contribution was 999 shares, the dividends from which the trustee was to receive, and pay, less expenses, to Mrs. Helmholz for life, *remainder to her appointee by will* and remainder to her issue; * * *” (Italics supplied.)

Although cognizant of this provision in the trust instrument, the Supreme Court made the following unequivocal statement at Page 96.

“The words of Section 302 (d) are, ‘where the enjoyment (of the transfer) was subject at the date

of his death to any change *through the exercise of a power*, either by the decedent alone or in conjunction with any person, *to alter, amend or revoke* * * *.' The agreement under consideration contains no such power as that described."

In the instant proceeding, the decedent had at most a power during his lifetime to reallocate the income of the trust fund among the income beneficiaries. This is not as great a power as the decedent had in the *Helmholz* case, as in that case the decedent had the right to the income from the trust fund during her lifetime and in addition had the power to appoint whomsoever she chose as the recipients of the income upon her death.

If there was no power in the decedent to alter, amend or revoke under the trust instrument involved in the *Helmholz* case and the Board of Tax appeals, the Court of Appeals of the District of Columbia and this Court so held, it would follow *a fortiori* that the decedent in this case had no power to alter, amend or revoke under the trust instrument involved here.

Petitioners' contention that the instant case is controlled by the *Helmholz* case is corroborated by the opinion of the United States Board of Tax Appeals in the instant case, for the Board made the following statement in its opinion (R. 59-60)

"* * * it is settled law that the retention of a power to alter the disposition of trust income does not make the trust a transfer to take effect at or after death; it is only a power to alter the disposition of corpus that has such estate tax consequence. *Waldemar R. Helmholz, Executor*, 28 B. T. A. 165; *affd.*, 75 Fed. (2d) 245; *affd.*, 296 U. S. 93; *Charles H. W. Foster et al., Executors*, 26 B. T. A. 708; *affirmed without opinion*, First Circuit Court of Appeals, March 20,

1933. The value of the corpus of this trust may not be included in decedent's gross estate under section 302 (c).

Section 302 (d) of the Revenue Act of 1926 requires the inclusion of the value of the corpus of a trust in a decedent's gross estate where 'the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.' Here again, it is settled that the value of the corpus is not includable in the gross estate unless the power to alter, amend, or revoke extends to corpus. *Waldemar R. Holmholz, Executor, supra*. See also *McFadden v. United States*, 20 Fed. Supp. 625."

The same view as to the applicability of the *Helmholz* case to a situation of this kind is shared by a District Court decision in Pennsylvania (see *McFadden v. United States*, 20 Fed. Supp. 625) in which the Court made the following statement at Page 632:

"But even if the decedent had reserved a power to change the shares of *income* which his wife and children should receive *after his death, this alone would appear not to be such a power to alter or amend as the statute contemplates. Helvering v. Helmholtz*, 296 U. S. 93, 56 S. Ct. 68, 80 L. Ed. 76." (Italics supplied.)

While the Court below must necessarily have disagreed with these views as to the meaning and effect of the *Helmholz* case, it is petitioners' contention that, in view of the Board of Tax Appeals' interpretation of the *Helmholz* decision and a similar interpretation by other Federal Courts, that a writ of certiorari should be granted for the purpose of clarifying this controversial question.

In reversing the Board of Tax Appeals, the Court below did not consider the applicability of Section 302 (c) of the Revenue Act of 1926 inasmuch as it was unnecessary to pass on this question in view of the interpretation placed by the Court below on the scope of Section 302 (d). In this petition for certiorari it would, therefore, seem to be unnecessary and superfluous to discuss the applicability of Section 302 (c) to any extent other than to point out that the Board of Tax Appeals in the instant case held that Section 302 (c) was not applicable and other Court decisions have reached a similar conclusion on similar facts (see *Charles H. W. Foster et al, Executors*, 26 B. T. A. 708, aff'd without opinion C. C. A., 1st Cir., March 20, 1933; *Helvering v. Helmholz*, *supra*; *May v. Heiner*, 281 U. S. 238; *Burnet v. Northern Trust Company*, 283 U. S. 782; *Morsman v. Burnet*, 283 U. S. 783; and *McCormick v. Burnet*, 283 U. S. 784). It is recognized, of course, that if a writ of certiorari is granted, the respondent may argue the applicability of Sec. 302(c) and that petitioners will obviously have to reply to his argument at that time.

As to the interpretation of the clause in the trust instrument reserving to the decedent a power of reallocation of income among certain beneficiaries, petitioners recognize that it would be fruitless to argue that a writ of certiorari issue on the basis that the Court below has erroneously construed this clause of the trust instrument. Accordingly, no argument on this point is addressed to the Court in this petition, but petitioners wish to reserve this point for argument on the merits if a writ of certiorari is issued by this Court. This is one of the errors listed in the Specification of Errors to be Urged which appears above in this petition for certiorari.

CONCLUSION

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, New York, March , 1942.

Respectfully submitted,

VALENTINE B. HAVENS,
Attorney for Petitioners.

